Padda Gurtaj Singh v Tune Talk Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-1755–11 OF 2020 AND W-02(IM)(NCC)-272–02 OF 2021
HANIPAH FARIKULLAH, LEE HENG CHEONG AND SEE MEE CHUN JJCA
22 MARCH 2022

Arbitration — Stay of proceedings — Grant of stay of proceedings — Appellant filed originating summons to compel respondents to register shares in his name — First respondent filed applications for stay — Whether s 10(1) of Arbitration Act 2005 applicable — Whether arbitration could not be invoked due to absence of written notice — Whether matter of registration of shares was not arbitrable — Whether ss 106 and 107 of Companies Act 2016 were exception to arbitrability — Whether respondents bound to effect registration — Whether stay ought to be granted — Arbitration Act 2005 ss 4 & 10

These two appeals involved the same parties and same relief, but a different shareholder. Appeal 1755 emanated from an originating summons ('the first OS') and related to a selling shareholder, Jason Jonathan Lo ('Jason'). Appeal 272 emanated from another originating summons ('the second OS') and related to a different selling shareholder, Tune Strategic Investments Ltd ('TSIL'). The appellant was a shareholder of the first respondent company. Both were parties to a shareholders agreement ('the SHA'). The second and third respondents were the company secretaries for the first respondent. On 5 November 2019, the second and third respondents, upon the instructions of the first respondent's shareholder, Jason, offered to sell to the appellant, 46,665 of the first respondent's shares. The offer was accepted, the purchase price paid and the shares registered in the appellant's name. According to the SHA, Jason may offer his remaining shares to any interested shareholder. As no other shareholder in the first respondent had taken up Jason's offer of the 46,665 shares, Jason instructed the second and third respondents to offer his remaining 431,998 shares in the first respondent to the appellant. The respondents did not register the shares on the basis that another shareholder, Celcom Axiata Bhd ('Celcom'), objected as Celcom contended it should have been offered the balance of the shares. Jason and the appellant concluded the sale and purchase on their own. Jason executed the transfer forms and gave his share certificates to the appellant, who paid the purchase price and settled the stamp duty for the transfer. The share certificates and the signed and stamped transfer form were served on the respondents. The respondents informed the appellant the first respondent could not act pending the shareholders concerned agreeing on a

position with regard to the objections raised by Celcom. The appellant filed the first OS to compel the respondents to register the balance shares in his name pursuant to ss 106 and 107 of the Companies Act 2016 ('the CA 2016'). On 5 December 2019, TSIL and other shareholders of the first respondent, namely Tune Group Sdn Bhd ('TG') and three others, offered their shares to other shareholders. The appellant elected to purchase 236,438 shares. TG issued a letter stating that 'at the expiry of the offer period on 19 January 2020, we did not receive any unconditional acceptance with attendant payment or at least the tender of the purchase price' and 'all five of us consider that exercise as having run its course and has lapsed'. TSIL was not a party to that letter. Celcom accepted the lapse of the exercise and the appellant challenged the validity of the letter. TSIL informed the respondents it accepted the appellant's offer and for it to do the needful to effect the transfer. The respondents did not and eventually returned the payment. TSIL and the appellant concluded the sale and purchase on their own. The transfer form was served on the respondents who did not register the transfer. This led to the filing of the second OS by the appellant for a similar relief under s 107 of the CA 2016. The first respondent filed applications for stay pursuant to s 10 of the Arbitration Act 2005 ('the AA 2005'). Both applications were allowed by the High Court and hence these appeals.

Held, dismissing the appeals:

(1) It could not be gainsaid there was an arbitration agreement in the form of cl 16 of the SHA. Both OSs filed by the appellant clearly raised a dispute where it involved a claim for the registration of the first respondent's shares into his name from Jason and TSIL. The claim was unresolved due to pre-emptive provisions in SHA and the objection by Celcom. The court did not delve into the merits of the dispute. The requirements of s 10(1) of the AA 2005 had thus been met — valid arbitration agreement in the form of cl 16 of the SHA; arbitration agreement not null and void, inapplicable, inoperative or incapable of being performed and no steps had been taken in the proceedings. The question of whether there was a dispute in existence or not was to be decided by arbitration. Therefore a stay was ought to be granted (see paras 46–47, 50 & 53–54).

(2) The submission that there was no dispute because the two-tier process in cl 16.1 of the SHA required a written notice of dispute to be issued, of which there was none, could not stand. There being an agreement to arbitrate, the invocation of it could not depend on absence of a written notice (see paras 55 & 57).

(3) The more relevant provision, if applicable, was s 4(2) of the AA 2005. This was because it provided for a situation where statute (in this case ss 106 and 107 of the CA 2016) conferred jurisdiction in respect of a matter on a court but did not refer to the determination of that matter by

arbitration. There were many cases from various jurisdictions that had allowed stay applications on disputes that came within the scope of an arbitration agreement despite the existence of distinct statutory provisions. There was, therefore, a presumption of arbitrability. Nevertheless, there were exceptions to the presumption of arbitrability. The exception to arbitrability would be if interests of wider parties, such as creditors, were involved; where Parliament intended to exclude arbitration or an inherent conflict between arbitration and public policy considerations (see paras 70, 72, 78 & 81).

(4) The appellant could not amount a challenge against arbitrability when the claim, dispute or controversy was indisputably connected to the pre-emption provisions contained in the articles of association read together with the SHA. Section 107(2) of the CA 2016 conferred a discretion on the court whether or not to register the shares. Such discretion could only be exercised after due enquiry into the reasons for the respondents' non-registration of the shares which necessarily had to lead to the pre-emption rights in the articles of association and SHA. The language employed in the statutory provisions did not expressly exclude arbitration and there had been no evidence put forth that it was the legislative intent to so exclude. Therefore, the statutory provisions as per ss 106 and 107 of the CA 2016 were not an exception to arbitrability. There could therefore, also be no issue of a statutory right being taken away by a private agreement to arbitrate or such statutory right rendering the matter incapable of arbitration (see paras 88–91).

(5) The restrictions on transfer of shares not being complied with did not affect the passing of beneficial interest, but it applied only to restrict the registration of legal interest. There could therefore, still be a restriction on registration of legal interest which was what the appellant was seeking. The respondents were not bound to recognise such beneficial interest given the dispute which had arisen on the pre-emption of SHA. Hence, whether the appellant was entitled to have the shares registered in his name and whether the respondents were bound to do so remains in dispute. Under the circumstances, the issue of the respondents being duty bound as agents to register the shares as per ss 164 and 165 of the Contracts Act 1950, did not arise (see paras 95 & 99–101).

(6) Section 10(1) of the AA 2005 made it mandatory for a court to grant a stay where there was a valid arbitration agreement, the arbitration agreement was not null and void, inapplicable, inoperative or incapable of being performed and no steps in the proceedings had been taken. The arbitration agreement here was cl 16 of the SHA, which required a dispute to be referred to arbitration. There was indeed a dispute for which the court need not delve into the merits (see paras 103).

[Bahasa Malaysia summary

Kedua-dua rayuan ini melibatkan pihak yang sama dan relif yang sama, tetapi pemegang saham yang berbeza. Rayuan 1755 berasal daripada saman pemula ('OS pertama') dan berkaitan dengan pemegang saham penjual, Jason Jonathan Lo ('Jason'). Rayuan 272 berasal daripada satu lagi saman pemula ('OS kedua') dan berkaitan dengan pemegang saham penjual yang berbeza, Tune Strategic Investments Ltd ('TSIL'). Perayu merupakan pemegang saham syarikat responden pertama. Kedua-duanya adalah pihak kepada perjanjian pemegang saham ('SHA'). Responden kedua dan ketiga ialah setiausaha syarikat bagi responden pertama. Pada 5 November 2019, responden kedua dan ketiga, atas arahan pemegang saham responden pertama, Jason, menawarkan untuk menjual kepada perayu, 46,665 saham responden pertama. Tawaran itu diterima, harga belian telah dibayar dan saham didaftarkan atas nama perayu. Menurut SHA, Jason bpleh menawarkan baki sahamnya kepada mana-mana pemegang saham yang berminat. Memandangkan tiada pemegang saham lain dalam responden pertama telah menerima tawaran Jason bagi 46,665 saham, Jason mengarahkan responden kedua dan ketiga untuk menawarkan baki 431,998 sahamnya dalam responden pertama kepada perayu. Responden tidak mendaftarkan saham tersebut atas dasar pemegang saham lain, Celcom Axiata Bhd ('Celcom'), membantah kerana Celcom berpendapat ia sepatutnya ditawarkan baki saham. Jason dan perayu memuktamadkan jual beli itu sendiri. Jason melaksanakan borang pindah milik dan memberikan sijil sahamnya kepada perayu, yang membayar harga belian dan menyelesaikan duti setem untuk pemindahan itu. Sijil saham dan borang pindah milik yang ditandatangani dan disetem telah diserahkan kepada responden. Responden memaklumkan perayu responden pertama tidak boleh bertindak sementara menunggu pemegang saham berkenaan bersetuju dengan pendirian berhubung bantahan yang dibangkitkan oleh Celcom. Perayu memfailkan OS pertama untuk memaksa responden mendaftarkan baki saham atas namanya menurut ss 106 dan 107 Akta Syarikat 2016 ('AS 2016'). Pada 5 Disember 2019, TSIL dan pemegang saham lain responden pertama iaitu Tune Group Sdn Bhd ('TG') dan tiga yang lain, menawarkan saham mereka kepada pemegang saham lain. Perayu memilih untuk membeli 236,438 saham. TG mengeluarkan surat yang menyatakan bahawa 'at the expiry of the offer period on 19 January 2020, we did not receive any unconditional acceptance with attendant payment or at least the tender of the purchase price' dan 'all five of us consider that exercise as having run its course and has lapsed'. TSIL bukan pihak dalam surat itu. Celcom menerima pelaksanaan luput tersebut dan perayu mencabar kesahihan surat itu. TSIL memaklumkan responden bahawa ia menerima tawaran perayu dan untuk melakukan perkara yang perlu untuk melaksanakan pemindahan itu. Responden tidak berbuat demikian dan akhirnya memulangkan bayaran. TSIL dan perayu memuktamadkan jual beli itu sendiri. Borang pindah milik telah disampaikan kepada responden yang tidak mendaftar pindah milik. Ini

membawa kepada pemfailan OS kedua oleh perayu untuk relif serupa di bawah s 107 AS 2016. Responden pertama memfailkan permohonan untuk penangguhan menurut s 10 Akta Timbang Tara 2005 ('ATT 2005'). Kedua-dua permohonan telah dibenarkan oleh Mahkamah Tinggi dan oleh itu rayuan ini.

Diputuskan, menolak rayuan-rayuan:

(1) Tidak boleh dinafikan bahawa terdapat perjanjian timbang tara dalam bentuk klausa 16 SHA. Kedua-dua OS yang difailkan oleh perayu jelas menimbulkan pertikaian di mana ia melibatkan tuntutan untuk pendaftaran saham responden pertama ke dalam namanya daripada Jason dan TSIL. Tuntutan itu tidak dapat diselesaikan kerana peruntukan pembelian dahulu dalam SHA dan bantahan oleh Celcom. Mahkamah tidak boleh meneliti merit pertikaian itu. Oleh itu, keperluan s 10(1) ATT 2005 telah dipenuhi — perjanjian timbang tara yang sah dalam bentuk klausa 16 SHA; perjanjian timbang tara tidak terbatal dan tidak sah, tidak terpakai, tidak berfungsi atau tidak mampu dilaksanakan dan tiada langkah telah diambil dalam prosiding itu. Persoalan sama ada wujud pertikaian atau tidak perlu diputuskan melalui timbang tara. Oleh itu penangguhan sepatutnya diberikan (lihat perenggan 46–47, 50 & 53–54).

(2) Hujahan bahawa tiada pertikaian kerana proses dua peringkat dalam klausa 16.1 SHA memerlukan notis pertikaian bertulis untuk dikeluarkan, yang mana tiada pun, tidak boleh bertahan. Terdapat perjanjian untuk timbang tara, permohonan itu tidak boleh bergantung pada ketiadaan notis bertulis (lihat perenggan 55 & 57).

(3) Peruntukan yang lebih relevan, jika berkenaan, ialah s 4(2) ATT 2005. Ini kerana ia memperuntukkan situasi di mana undang-undang (dalam kes ini ss 106 dan 107 AS 2016) memberikan bidang kuasa berkenaan dengan sesuatu perkara di mahkamah tetapi tidak merujuk kepada penentuan perkara itu melalui timbang tara. Terdapat banyak kes daripada pelbagai bidang kuasa yang telah membenarkan permohonan penangguhan bagi pertikaian yang datang dalam skop perjanjian timbang tara walaupun terdapat peruntukan berkanun yang berbeza. Oleh itu, terdapat anggapan boleh timbang tara. Walau bagaimanapun, terdapat pengecualian kepada anggapan boleh timbang tara. Pengecualian kepada kebolehtimbangtaraan adalah jika kepentingan pihak yang lebih besar, seperti pemiutang, terlibat; di mana Parlimen berhasrat untuk mengecualikan timbang tara atau konflik yang wujud antara timbang tara dan pertimbangan dasar awam (lihat perenggan 70, 72, 78 & 81).

(4) Perayu tidak boleh mencabar terhadap kebolehtimbangtaraan apabila tuntutan, pertikaian atau kontroversi itu tidak dapat dipertikaikan

berkaitan dengan peruntukan pembelian dahulu yang terkandung dalam artikel persatuan yang dibaca bersama-sama dengan SHA. Seksyen 107(2) AS 2016 memberikan budi bicara kepada mahkamah sama ada untuk mendaftarkan saham atau tidak. Budi bicara sedemikian hanya boleh dilaksanakan selepas siasatan yang sewajarnya mengenai sebab responden tidak mendaftar saham yang semestinya perlu membawa kepada hak pembelian dahulu dalam artikel persatuan dan SHA. Bahasa yang digunakan dalam peruntukan berkanun tidak secara jelas mengecualikan timbang tara dan tidak ada bukti yang dikemukakan bahawa ia adalah niat perundangan untuk mengecualikan sedemikian. Oleh itu, peruntukan berkanun seperti ss 106 dan 107 AS 2016 tidak terkecuali kepada kebolehtimbangtaraan. Oleh itu, tidak mungkin timbul isu hak berkanun yang diambil melalui perjanjian persendirian untuk timbang tara atau hak berkanun sedemikian yang menyebabkan perkara itu tidak boleh ditimbang tara (lihat perenggan 88–91).

(5) Sekatan ke atas pemindahan saham yang tidak dipatuhi tidak menjejaskan kepentingan berfaedah, tetapi ia hanya terpakai untuk menyekat pendaftaran kepentingan undang-undang. Oleh itu, masih terdapat sekatan ke atas pendaftaran kepentingan undang-undang yang mana yang dipohon oleh perayu. Responden tidak terikat untuk mengiktiraf kepentingan berfaedah tersebut memandangkan pertikaian yang timbul berkaitan pembelian dahulu SHA. Oleh itu, sama ada perayu berhak untuk mempunyai saham didaftarkan atas namanya dan sama ada responden terikat untuk berbuat demikian masih menjadi pertikaian. Di bawah keadaan itu, isu responden yang terikat sebagai ejen untuk mendaftarkan saham mengikut ss 164 dan 165 Akta Kontrak 1950, tidak timbul (lihat perenggan 95 & 99–101).

(6) Seksyen 10(1) ATT 2005 mewajibkan mahkamah memberikan penangguhan apabila terdapat perjanjian timbang tara yang sah, perjanjian timbang tara itu tidak terbatal dan tidak sah, tidak terpakai, tidak berfungsi atau tidak mampu dilaksanakan dan tiada langkah dalam prosiding telah diambil. Perjanjian timbang tara di sini ialah klausa 16 SHA, yang memerlukan pertikaian untuk dirujuk kepada timbang tara. Memang terdapat pertikaian yang mana mahkamah tidak perlu meneliti ke dalam merit (lihat perenggan 103).]

Cases referred to

A Ayyasamy v A Paramasivam and Others [2016] 7 MLJ 396, SC (refd)

Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [2019] 5 MLJ 186; [2019] 1 CLJ 305, FC (refd)

Bridgehouse (Bradford No 2) Ltd v BAE Systems plc [2020] EWCA Civ 759, CA (refd)

Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 1 MLJ 101; [2004] 4 CLJ 533, FC (refd)

Ellerine Bros (Pty) Ltd and another v Klinger [1982] 2 All ER 737, CA (refd)
Fernlake Pty Ltd, Re (1994) 12 ACLC 453, SC (refd)
Fulham Football Club (1987) Ltd v Richards and another [2012] 1 All ER 414, CA (refd)
Gadang Engineering (M) Sdn Bhd v Bluwater Developments Berhad [2010] MLJU 367, HC (refd)
Hayter v Nelson & others (1990) 23 ConLR 88, QBD (refd)
Kassem v Secure Distribution Services Inc [2004] OJ No 508 (refd)
Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414; [2011] SGCA 21, CA (refd)
Ling Beng Hui & Ors v Ling Beng Sung [1990] 2 MLJ 186, HC (refd)
Lyle and Scott Ltd v Scott's Trustees; Lyle & Scott Ltd v British Investment Trust Ltd [1959] AC 763, HL (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)
Rodgers v Advanced Creative Technologies Ltd [2013] NZCCLR 17, HC (refd)
TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857, CA (refd)
Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal [2020] 3 MLJ 545, FC (refd)
Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] 4 SLR 732; [2009] 4 SLR(R) 732, CA (refd)
Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57, CA (refd)
Wealands (widow and administratrix of the estate of Wealands (decd)) v CLC Contractors Ltd (Key Scaffolding Ltd and another, third parties) [2000] 1 All ER (Comm) 30, CA (refd)
Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd [1998] 1 HKC 254 (refd)
ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd [2014] 10 MLJ 633, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 4, 4(1), (2), 10, 10(1), (1)(b)
Companies Act 2006 [UK] ss 994, 1028(3)
Companies Act 2016 ss 102(2), 106, 106(1), (1)(a), (3), 107, 107(2)
Contracts Act 1950 ss 164, 165
International Arbitration Act 1994 [SG] s 11
National Land Code Form 16D

Appeal from: Suit Nos WA-24NCC-289–07 of 2020 and WA-24NCC-421–09 of 2020 (High Court, Kuala Lumpur)

Fahri Azzat (with Yap Yin Yin) (Fahri, Azzat and Co) in Civil Appeal

Nos W-02(IM)(NCC)-1755–11 of 2020 and W-02(IM)(NCC)-272–02 of 2021 for the appellant.

Foo Joon Liang (with Kang Mei Yee) (Gan Partnership) in Civil Appeal Nos W-02(IM)(NCC)-1755–11 of 2020 and W-02(IM)(NCC)-272–02 of 2021 for the first respondent.

Christine Yee Seng Lee (Murad Yee Partnership) in Civil Appeal Nos W-02(IM)(NCC)-1755–11 of 2020 and W-02(IM)(NCC)-272–02 of 2021 for the second and third respondents.

See Mee Chun JCA:

INTRODUCTION

[1] There are two appeals heard together before the court, which involve the same parties and same reliefs, but a different selling shareholder. They are Appeal 1755 and Appeal 272. Appeal 1755 emanates from OS WA-24NCC-289–07 of 2020 ('first OS') and relates to a selling shareholder. Jason Jonathan Lo ('Jason'). Appeal 272 emanates from OS WA-24NCC-289–07 of 2020 ('second OS') and relates to a different selling shareholder, Tune Strategic Investments Ltd ('TSIL').

[2] We dismissed both appeals and give our reasons as follows.

PARTIES

[3] The appellant is a shareholder of the first respondent company. Both are parties to a shareholders agreement dated 23 December 2008 ('SHA'). The second and third respondents are the company secretaries for the first respondent.

EVENTS LEADING TO THE ORIGINATING SUMMONSES (OSS)

First OS — Appeal 1755

[4] On 5 November 2019, the second and third respondents, upon the instructions of the first respondent's shareholder, Jason, offered to sell to the appellant, 46,665 of the first respondent's shares. The offer was accepted, the purchase price paid and the shares registered in the appellant's name. According to the SHA, Jason may offer his remaining shares to any interested shareholder. As no other shareholder in the first respondent had taken up Jason's offer of the 46,665 shares, Jason instructed the second and third respondents to offer his remaining 431,998 shares in the first respondent to the appellant. This was by letter dated 8 January 2020. The appellant submitted the executed form of acceptance and a cheque for the purchase price on 7 February 2020.

[5] The respondents did not register the shares on the basis that another shareholder, Celcom Axiata Bhd ('Celcom'), objected as Celcom contended it should have been offered the balance of the shares.

[6] Jason and the appellant concluded the sale and purchase on their own. Jason executed the transfer forms and gave his share certificates to the appellant, who paid the purchase price and settled the stamp duty for the transfer. On 10 June 2020, the share certificates and the signed and stamped transfer form were served on the respondents.

[7] On 22 June 2020, the respondents informed the appellant the first respondent could not act pending the shareholders concerned agreeing on a position with regard to the objections raised by Celcom.

[8] The appellant filed the first OS to compel the respondents to register the balance shares in his name pursuant to ss 106 and 107 of the Companies Act 2016 ('the CA 2016').

Second OS — Appeal 272

[9] On 5 December 2019, TSIL and other shareholders of the first respondent, namely Tune Group Sdn Bhd (TG), Kalimullah bin Masheerul Hassan ('Kalimullah'), Lim Kian Onn ('Lim') and Christopher Anthony Lancaster ('Christopher'), offered their shares to other shareholders. On 20 December 2019, the appellant elected to purchase 236,438 shares. On 8 January 2020, the appellant qualified its acceptance by requesting a valuation to be done to determine the fair market value ('FMV').

[10] On 30 January 2020, TG issued a letter stating that 'at the expiry of the offer period on 19 January 2020, we did not receive any unconditional acceptance with attendant payment or at least the tender of the purchase price' and 'all five of us consider that exercise as having run its course and has lapsed'. TSIL was not a party to that letter.

[11] On 5 February 2020, Celcom accepted the lapse of the exercise. On 6 February 2020, the appellant challenged the validity of the letter. On 13 March 2020, the appellant waived the requirement for FMV and submitted several cheques for payment of the purchase price.

[12] On 18 March 2020, TSIL informed the respondents it accepted the appellant's offer and for it to do the needful to effect the transfer. The respondents did not and eventually returned the payment.

[13] Similar to Appeal 1755, TSIL and the appellant concluded the sale and

purchase on their own. Here, as per the respondents' contention, the taking up of the shares at the sum of RM1,145,808 amounts to approximately RM4.85 per share, whereas the offer had stipulated a sum of RM3 per share. The transfer form was served on the respondents who did not register the transfer.

[14] This led to the filing of the second OS by the appellant for a similar relief under s 107 of the CA 2016.

The SHA and articles of association

[15] At this point, it bears noting that other than the appellant and the first respondent, the other parties to the SHA are Celcom, Jason, TSIL, TG, Kalimullah, Lim and Christopher.

[16] Recital C of the SHA sets forth that the SHA regulates the relationship of the shareholders of the first respondent and the affairs of their dealings with the first respondent. Clause 9 contains pre-emption provisions and are also to be found in articles 37–52 of the articles of association. Articles 60–63 provide that transfers are subject to the articles of association and the SHA setting out then the administrative process for transfer. Article 168 provides the provisions of the SHA shall prevail for the purposes of determining any issue arising between its members.

[17] The SHA also contains a reference to arbitration as per cl 16.

The stay applications

[18] The first respondent filed applications for stay pursuant to s 10 of the Arbitration Act 2005 ('the AA 2005'). It is not disputed that these were filed before it took any steps in the proceedings. Both applications were allowed by the High Court.

FINDINGS OF THE HIGH COURT

[19] The same learned judicial commissioner ('JC') heard the OSs.

First OS

[20] In the first OS, the JC referred to s 10(1) of the AA 2005 and stated its scope and application is well settled and referred to two Federal Court decisions namely, *Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another appeal* [2020] 3 MLJ 545 and *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1. It was further stated the sole issue in relation to the application is whether the proceedings are the subject matter of

A the arbitration agreement and if not, the court has no jurisdiction to grant a stay. The court is then required to identify the substance of the dispute or controversy in this litigation. The first defendant (first respondent) has the burden of proving that there exists a valid and binding agreement whilst the plaintiff (appellant) bears the burden of proving that the arbitration agreement B is null and void, inoperative or incapable of being proved.

[21] The court referred to cl 16 of the SHA where the parties have agreed to refer 'any controversy, claim or dispute' which arise out of or in relation to the SHA to arbitration to determine whether the proceedings are 'brought in C respect of a matter which is the subject matter of an arbitration agreement'.

[22] The court also considered that attending its power to grant the plaintiff's (appellant) prayers, regard is to be had to ss 106 and 107 of the CA 2016. Arguments were heard on whether the arbitration agreement has to yield D to s 107 of the CA 2016 and whether the non-registration of the shares is arbitrable as envisaged by s 4 of the AA 2005. The court in its grounds of judgment, made various findings as follows:

E (a) the absence of any written notice of dispute does not make the arbitration agreement inoperative and is not a reason nor basis to refuse a stay so long as there is a valid arbitration agreement. The non-registration of the transfer of the 431,908 shares is a subject matter of the arbitration agreement as contained in the SHA (para 61);

F (b) the non-existence of a notice of dispute or non-fulfilment of the condition precedent to arbitration is relevant in determining whether there is a dispute, claim or controversy that ought to be referred to arbitration (para 62);

G (c) the plaintiff's purchase of the 431,908 remaining shares of Jason and the company's refusal to register the transfer is a matter to be properly determined pursuant to the arbitration agreement as the dispute or controversy 'arises out of or in relation to' the SHA, in reliance on *Ellerine Bros (Pty) Ltd and another v Klinger* [1982] 2 All ER 737 (para 64);

H (d) the case falls within the ambit of the arbitration agreement due to cl 9 SHA, articles 37 and 168 of the articles of association and cl 16 where the parties have agreed to refer 'any controversy, claim or dispute to' arbitration (para 66);

I (e) s 107(2) which provides that the court may order the company to register the transfer, if the court is satisfied that the application is well founded, gives the court a discretion whether or not to register the shares, such discretion being exercised after due enquiry into the circumstances of the company's refusal to register which inevitably leads

back to the issue of pre-emption rights both in the company's articles of association and the SHA (para 67);

(f) the issue of arbitrability in the context of ss 106 and 107 must be considered in the context of pre-emption provisions both in the SHA and the company's articles of association being recognised and that ss 106 and 107 of the Companies Act 2016 do not expressly preclude the arbitrability of the matter, neither is it against public policy to arbitrate the matter (para 69);

(g) the dispute over the non-registration of the shares arising from the arbitration agreement in the SHA is arbitrable and the arbitration agreement is not null and void, inoperative of being performed (para 71);

(h) on the potential commission of an offence by the first defendant (respondent), in reliance of Indian authorities, it was said that allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement (para 72);

(i) the proceedings had to be stayed as the court has no discretion having regard to s 10(1) of the AA 2005 and the terms of cl 16 of SHA obligates the court to make an order to stay unless the arbitration agreement is null and void, inoperative or incapable of being performed. There is no discretion not to stay as the court is bound by the Federal Court decisions in *Tindak Murni* and *Press Metal Sarawak*. Even if the court had a discretion, a stay would be granted as parties have chosen arbitration over litigation in court, and the court ought to honour the parties' agreement and it is the court's duty to uphold bargains and not strike it down (para 74); and

(j) cl 9.2 in relation to the transfer notice constituting the company as the agent of the share transferor is part and parcel of SHA and the court is not to delve into the merits of whether the company is indeed so (para 76).

Second OS

[23] In the grounds of judgment for the second OS, the court in para 23 noted the first OS where the same cl 16 SHA had been considered and her findings therein in paras 66, 68, 69, 71, 73, 74 and 76 of the grounds.

[24] In para 24 it was then stated:

> [24] Just as in the first case, I am satisfied in this present case, that the subject matter of the OS falls within the ambit of s 10(1) of the AA 2005:

(a) there is valid arbitration agreement in cl 16;

(b) the arbitration agreement is not null and void, inapplicable, inoperative or incapable of being performed; and

(c) the first defendant has not taken any other steps in the proceedings prior to the filing of encl 7.

[25] It was further stated in para 28:

> [28] It is my firm view that the subject matter of the OS on whether the plaintiff is entitled to have the 236,438 shares registered in his name, and whether the company is bound to do so, are in dispute and subject to resolution by the omnipresence of the arbitration agreement. As such, with respect, it is not open to the plaintiff in opposing the stay application, to assert that the registration of the 236,438 shares is now merely procedural and administrative.

Submissions of the appellant

[26] It was submitted that the High Court did not consider the beneficial interest of the appellant in the balance shares and this was contrary to the Federal Court decision in *Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101; [2004] 4 CLJ 533. Here, Jason and TSIL had executed the transfer forms, surrendered the share certificates to the appellant and received payment from the appellant. This meant the appellant had beneficial interest. Further, the role of the respondents as agents for the transferor, despite it being a duty imposed by cl 9.2 of SHA, was disregarded.

[27] The further submissions were that there were no disputes capable of settlement by arbitration under the law. Section 4(1) of the AA 2005 must be considered together if not before s 10. Section 4(1) preserves the court's discretion over whether a matter should be referred to arbitration, *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 5 MLJ 186; [2019] 1 CLJ 305. This is because it provides that parties to an arbitration agreement may be so determined unless it is contrary to public policy or the subject matter is not capable of settlement by arbitration.

[28] The appellant took the position it fulfils both requirements. The matter cannot be settled by arbitration as it is for the registration of shares pursuant to s 107 of the CA 2016, which can only be decided and ordered by the courts. There is also no dispute between Celcom and the appellant within the meaning of cl 16 SHA where a written dispute notice has to be first issued which without that, there is only a disagreement which parties are to work out themselves.

[29] Further, the stay application is contrary to public policy for four reasons. Firstly, the contract is concluded, beneficial interest has passed and it

only awaits the court to formally recognise the appellant's ownership over the shares. The court is to uphold and give effect to contracts as between parties. Secondly, when the respondents refuse to register the shares, it is a breach of s 106(3) and potentially s 102(2) of the CA 2016. A stay means the court ratifying such breach. Thirdly, in referring to arbitration, the appellant is deprived from exercising any rights over the shares or enjoying the benefits. Fourthly, the appellant's statutory right to have the shares registered cannot be taken away by a private agreement to refer a dispute to arbitration.

Submissions of the first respondent

[30] It was submitted the requirements of s 10(1) of the AA 2005 have been fulfilled, namely a valid arbitration agreement; the arbitration agreement is not null and void, inapplicable, inoperative or incapable of being performed and no steps have been taken prior to the stay applications.

[31] A claim, dispute or controversy in relation to the registration of shares is registrable notwithstanding CA 2016. Reference was also made to s 4(2) of the AA 2005 of the court's presumptive leaning on arbitrability despite distinctive statutory provisions. Various authorities were cited, such as *Wealands (widow and administratrix of the estate of Wealands (decd)) v CLC Contractors Ltd (Key Scaffolding Ltd and another, third parties)* [2000] 1 All ER (Comm) 30, *Fulham Football Club (1987) Ltd v Richards and another* [2012] 1 All ER 414, *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc* [2020] EWCA Civ 759, *Kassem v Secure Distribution Services Inc* [2004] OJ No 508 and *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR 732; [2009] 4 SLR(R) 732 and *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414; [2011] SGCA 21. These illustrate that stay applications that come within the purview of an arbitration agreement are allowed despite the existence of distinctive statutory provisions.

[32] The Federal Court in *Arch Reinsurance Ltd* had only decided that s 4(1) of the AA 2005 applied on the basis that the National Land Code ('the NLC') is a complete and comprehensive code and the dispute triggered by the statutory notice of demand in Form 16D of the NLC is not arbitrable.

[33] The first respondent recognised there can be exceptions to the presumption of arbitrability as was said in *Larsen Oil* at para 44 in situations where Parliament intended to preclude the use of arbitration or there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

[34] It was submitted that the appellant is not, however, seeking a relief or

remedy to liquidate the first respondent. The adjudication of the claim to shares does not involve the wider interest of parties outside SHA. This is, therefore, not a case that falls within the exception of arbitrability.

[35] The provisions of ss 106 and 107 of the CA 2016 are not applicable. Section 106(1) provides that a company shall register transfer of shares unless the Act or the constitution expressly permits the directors to refuse or delay registration. Here there are unresolved disputes between the shareholders regarding the compliance of the pre-emptive provisions. The power of the court to order registration is to be exercised if it is satisfied the application is well founded.

[36] It was next submitted there is an existence of a controversy, claim or dispute which arises out or in relation to SHA and the court does not need to determine the existence of a dispute as per *Press Metal Sarawak* and *Tindak Murni*. Further, the complaints about the appellant's beneficial interest and the liability of the respondents to register the sale of the shares need not be determined by the court.

Submissions of the second and third respondents

[37] The counsel for the second and third respondents informed the court that they are the first respondent's company secretary and their role is administrative. They stand neutral and leave the points of law to the court.

OUR ANALYSIS AND FINDING

Application of s 10(1) of the AA 2005

[38] As the stay applications are premised on s 10(1) of the AA 2005, we shall first consider its applicability or otherwise. The aforesaid provision provides:

> 10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[39] The scope and application of s 10(1) of the AA 2005 is well established and we can do no better than to refer to *Tindak Murni* and *Press Metal Sarawak*.

[40] In *Tindak Murni*, the Federal Court referred to *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857, which compared the pre and post amendment to s 10 and agreed with the passage in para 24: 'that the effect of the amendment to that section is to render a stay mandatory

unless the agreement is null and void or impossible of performance, The court is no longer required to delve into the facts of the dispute when considering an application for stay'. The Federal Court then went on at p 319:

> The position stated above is therefore trite, namely that the court is not to enquire or investigate whether there subsists a dispute warranting referral to arbitration. That is a matter for the consideration and determination of the arbitral tribunal.

[41] The court had in the preceding passage stated:

> Under s 10 of the Arbitration Act 2005 as it presently stands, there is no question of the court entering into the arena of whether or not a 'dispute' subsists between the parties. The role of the court is simply as set out in s 10, which we have explained in extenso above.

[42] The court also noted that prior to the amendment to s 10, courts expended considerable time and effort in determining whether a dispute subsisted by virtue of the earlier wording, particularly s 10(1)(b) 'that there is in fact no dispute between the parties with regard to the matters to be referred'.

[43] In *Press Metal Sarawak*, this was said at p 429 (MLJ); p 17 (CLJ):

> [33] What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference (see *TNB Fuel Services Sdn Bhd*). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.

[44] It was also stated at p 443 (MLJ); p 30 (CLJ) on a liberal and commercial approach in construing the scope of arbitration agreements:

> [91] In determining what is the dispute or difference the parties intended to submit to arbitration, the arbitration clause ought to be interpreted widely based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the contract or agreement was made. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit to the commercial purpose of the arbitration clause.

[45] It is thus clear that s 10(1) of the AA 2005 only requires the following:

(a) there is a valid arbitration agreement;

(b) the arbitration agreement is not null and void, inapplicable, inoperative or incapable of being performed; and

(c) no steps in the proceedings have been taken.

[46] It cannot be gainsaid there is an arbitration agreement in the form of cl 16 SHA. Clause 16 provides the following:

> 16. Arbitration
>
> 16.1 If any controversy, claim or dispute arises out of or in relation to this Agreement (including any question regarding its existence, validity or termination) or with respect to any breach thereof, the Parties shall seek to resolve the matter amicably through discussions between the Parties or by way of mediation. Only if the Parties fail to or compromise within sixty (60) days from the date of written notice of the dispute, the aggrieved Party shall seek arbitration as set forth in this Clause 16.
>
> 16.2 Any such controversy, claim or dispute shall be finally settled by arbitration by the Regional Centre for Arbitration Kuala Lumpur (RCAKL) in accordance with the UNCITRAL Rules.
>
> ...
>
> 16.4 All arbitration proceedings shall take place at the RCAKL, in accordance with the Rules of the RCAKL and the language to be used in the arbitral proceedings shall be English. The decision of the arbitrators is final and is binding on the Parties and the Parties agree to exclude any right of application or appeal to any courts of competent jurisdiction in connection with any question of law arising in the course of the arbitration or in respect of any award made.

[47] Both OSs filed by the appellant clearly raises a dispute where it involves a claim for the registration of the first respondent's shares into his name from Jason and TSIL. The dispute is whether the appellant is entitled to the registration of the shares and whether the respondents are bound to so register.

[48] As noted in *Press Metal Sarawak*, a liberal and commercial approach in construing the scope of arbitration agreements is to be taken. In *Gadang Engineering (M) Sdn Bhd v Bluwater Developments Berhad* [2010] MLJU 367, the High Court had to examine the meaning of 'dispute' in the arbitration clause where Saville J in English High Court of *Hayter v Nelson & others* (1990) 23 ConLR 88 was cited in particular at pp 92–93:

> The proposition must be that if a claim is indisputable then it cannot form the subject of a 'dispute' or 'difference' within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration.
>
> To my mind such propositions have only to be stated to be rejected — as indeed they were rejected by Mr Justice Kerr (as he then was) in *The M Eregli* [1981] 2

> Lloyd's Rep 169, in terms approved by Lords Justices Templeman and Fox in *Ellerine v Klinger* (sup). As Lord Justice Templeman put it (at p 1383):- There is a dispute until the defendant admits that the sum is due and payable.
>
> In my judgement in this context neither the word 'disputes' nor the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

[49] Hence, there is indeed a dispute given the wide meaning and in particular, whether one is indisputably right and another indisputably wrong, does not mean there can never be a dispute. The example of the Oxford Cambridge Boat Race illustrates this well.

[50] Without delving too much into the facts of the dispute as stated in *Tindak Murni* and *Press Metal Sarawak*, the claim is unresolved due to pre-emptive provisions in SHA and the objection by Celcom.

[51] It bears mention that in *Tindak Murni*, the court at p 563 (MLJ); p 320 (CLJ) noted as follows:

> (b) The second reason why a stay is justified is that there is in point of fact a dispute subsisting between the parties. We are constrained to deal with this issue, notwithstanding our explanation of the law above, as it comprised a substantial part of the contractor's response, in defending the appeals.

[52] Similarly, in *Press Metal Sarawak*, the court in the process of dealing with the sub-topics of a valid arbitration agreement, scope of arbitration clause and matters within the scope of the arbitration clause may have considered the nature of the dispute.

[53] However, this does not detract from the clear principles established as set out above that the court does not delve into the merits of the dispute.

[54] The requirements of s 10(1) of the AA 2005 have thus been met — valid arbitration agreement in the form of cl 16; arbitration agreement not null and void, inapplicable, inoperative or incapable of being performed and no steps have been taken in the proceedings. The question of whether there is a dispute in existence of not is to be decided by arbitration. We would therefore agree a stay be granted.

No written notice to refer to arbitration

[55] The submission that there is no dispute because the two-tier process in cl 16.1 requires a written notice of dispute to be issued, of which there was none, cannot stand. *Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd* [1998] 1 HKC 254 concerned an arbitration contract where the dispute had to be referred to the architect and if either party was unhappy with the decision or if no decision was made within 90 days, the matter may be referred to arbitration. The stay application was resisted on the basis that no dispute had yet been referred to the architect. This was said at p 258:

> An agreement that requires that the parties submit their disputes ultimately to arbitration, although it may also require the parties in the first instance to follow a procedure — such as, attempting an amicable settlement is, to my eyes, an arbitration agreement. A first instance procedure such as this is not in any way inconsistent with the concept of arbitration, or with our statutory definition of 'arbitration agreement'.
>
> There is, therefore, as I see it, a clear 'agreement by the parties to submit to arbitration' their disputes. It matters not, it seem to me, that the parties must, firstly, take some other step before this is done.

[56] The reasoning in *Westco* was followed in *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633:

> [94] Lastly, this issue of whether the steps provided in cl 63 have to be taken before the arbitration agreement is invoked. In my judgement, it does not matter that the terms of cl 63 requires certain steps to be taken. The operation of arbitration clauses cannot depend on whether parties actually refer the matter to arbitration; unless of course, the parties mutual agree that it does not, or where the statutory exceptions in s 10 are present. If arbitration clauses were dependent on such a reading, as opined by Keith JA in *China Merchants Heavy Industry Co Ltd v JGC Corp* [2001] 3 HKC 580, 'It is ... stretching the language of art 8(1) unduly to call an agreement conferring on a party the right to refer a dispute to arbitration 'inoperative' merely because that party chooses not to exercise that right'.
>
> [95] Even if no reference has been made under of 63, that still does not make the arbitration agreement inoperative or incapable of being performed. In the case of *Westco Airconditioning Limited v Sui Chong Construction & Engineering Co Limited* [1998] HKC 254, it was argued that the arbitration was 'subject to a condition precedent, that it, before the matter may proceed to arbitration, the architect must decide the matter, or the time for him to make a decision must elapsed, neither of which has happened. This means, says Mr Lam, that the arbitration agreement was 'inoperative'.
>
> ...
>
> [99] In any case, having regard to the whole agreement in which this arbitration agreement is housed, it is quite apparent that the parties intended the resolution of

any of their dispute or difference through a process other than recourse to the court. If the plaintiff's arguments were to be accepted, it can be seen that it may be open to abuse. Parties may avoid their contractual obligations by simply not complying with its terms. It is in this regard that a more robust approach needs to be taken.

[57] There being an agreement to arbitrate, the invocation of it cannot depend on absence of a written notice.

Arbitrability of matter and s 4 of the AA 2005

[58] It was also raised that the matter of the registration of shares is not arbitrable as it is already provided for in ss 106 and 107 of the CA 2016 and vested in the courts.

[59] We deal first with s 4 of the AA 2005. It provides as follows:

4(1) Any dispute which the parties have agreed to submit to arbitration under a arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.

(2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.

[60] In *Arch Reinsurance Ltd*, the main issue was whether the right of the chargee under the NLC to foreclose the security under the charge could be stayed under s 10 of the AA 2005 pending arbitration pursuant to an arbitration clause in an earlier agreement (the underlying agreement) between the parties. This underlying agreement was the subscription agreement the respondent, in compliance with the terms of the subscription agreement executed a charge on the mining lease in favour of the appellant. The charge had a provision that the governing law was the law of Malaysia and that parties unconditionally agree to submit to the non-exclusive jurisdiction of the Malaysian courts. The Federal Court held this provision was not accidental or due to oversight but by choice. Under the NLC the power to make an order for sale of the security by public auction is vested with the court and it is for the court and not the arbitrator, to decide whether there is a breach of the terms of the charge.

[61] The court further stated at p 322:

[47] ... Unlike the subscription agreement, the charge does not contain any arbitration clause akin to cl 26.2 of the subscription agreement for settlement of dispute between parties. The jurisdiction of the arbitrator under the subscription agreement is limited by the terms of the arbitration clause, namely cl 26.2. It does

not extend beyond the terms of the arbitration agreement.

[62] The court also held that the charge is a separate and distinct document, not subordinated to the subscription agreement.

[63] Up until this point, it would appear that the court proceeded on the basis that the charge had no arbitration clause and therefore, the specific provision on submission to the non-exclusive jurisdiction of Malaysian courts and the NLC would apply. This is all the more apparent as the matter of arbitrability only arose after the above finding at pp 323–324 as follows:

> Arbitrability issue
>
> [51] We have expressed the view that the charge is a separate document which was executed after the subscription agreement (inclusive of the bond conditions). It is not subordinated to the subscription agreement. It was mutually agreed by the parties to the subscription agreement that the bonds would be secured by a charge in accordance with the NLC over the mining lease and that the appellant could foreclose on the security in the event of default by the respondent in redeeming the bonds on the maturity date. The maturity date was fixed by consent of the parties.
>
> [52] But in view of the differences of opinion between the parties on the arbitrability of the subject matter of the charge, we deem it necessary to deliberate on the issue.

[64] After being referred to a series of cases on this issue, the court stated at p 327:

> [66] A registered charge under the NLC acquires an indefeasible title to the charged security ... The statutory right of the charge to indefeasible title and to sell the security in the event of default by the charger cannot be taken away by private agreement between them ... Any attempt to take away or curtail the rights of the charge by way of a private agreement is, in our view, contrary to public policy.
>
> [67] The NLC is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidence of it as well as other important matters affecting land ... In *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd*, it was held that the provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI are exhaustive and exclusive and any attempt at contracting out of those rights unless expressly provided for in the Code would be void as being contrary to public policy. Hence the dispute triggered by the statutory notice of demand in Form 16D is not arbitrable under s 4(1) of the Arbitration Act 2005.

[65] *Arch Reinsurance Ltd* was therefore decided on the basis that there was no arbitration clause in the charge and that the NLC is a complete and comprehensive code on matters governing land. It does not necessarily mean that s 4(1) of the AA 2005 applies to all situations.

[66] On the issue of arbitrability, we note that it was not raised in the two leading cases of *Tindak Murni* and *Press Metal Sarawak*. It may well be that the situation did not warrant it. If at all it has to be considered, it has to be viewed in the light of s 10 where the requirements as stated therein must first be fulfilled. It is only upon the fulfilment of those requirements that one moves on to arbitrability. This is because, without an arbitration agreement, there can be no issue of arbitrability.

[67] The appellant had advanced four reasons for the arbitration agreement being contrary to public policy namely, the court is to uphold and give effect to contracts as between parties as per the registration of shares; the court ratifying a breach of ss 106(3) and 102(2) of the CA 2016 being deprived from exercising any rights over the shares or enjoying the benefits; and the statutory right to have the shares registered cannot be taken away by a private agreement to refer a dispute to arbitration.

[68] Reason one that the court is to uphold and give effect to contracts can also equally apply to parties having to give effect to the requirement to have the matter arbitrated in accordance with cl 16 SHA. On ratification of a breach by the ourt, the Indian Supreme Court case of *A Ayyasamy v A Paramasivam and Others* [2016] 7 MLJ 396 (SC) at p 413 is relevant:

> 12. Hence allegations of criminal wrongdoing or of statutory violation would hot detract from the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement.

Note: MLJ refers to Madras Law Journal.

[69] The third reason of deprivation of rights or benefits does not amount to a contravention of public policy where such a deprivation has yet to be established. The fourth reason of statutory right versus a private agreement to refer to arbitration will be considered below vis a vis ss 106 and 107 of the CA 2016.

[70] We are of the considered opinion that the more relevant provision, if applicable, is s 4(2) of the AA 2005. This is because it provides for a situation where statute (in this case ss 106 and 107 of the CA 2016) confers jurisdiction in respect of a matter on a court but does not refer to the determination of that matter by arbitration.

[71] We had earlier looked at *Arch Reinsurance Ltd* where we found that s 4(1) applied, under the facts of that case.

[72] We find that there are many cases from various jurisdictions that have allowed stay applications on disputes that come within the scope of an arbitration agreement despite the existence of distinct statutory provisions. There is, therefore, a presumption of arbitrability as stated in *Larsen Oil* in the context of s 11 of the Singapore International Arbitration Act, which is our s 4 of the AA 2005. More on *Larsen Oil* later.

[73] We start with *Fulham Football Club*, an English Court of Appeal case relating to unfair prejudice in s 994 of the Companies Act 2006 which a shareholder sought to invoke as assistance from the court although there was an arbitration agreement. At p 436, this was said:

> [77] The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA rules would have the power to grant the specific relief sought by Fulham in its s 994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. Nor does the determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties.
>
> [78] ... The statutory provisions about unfair prejudice contained in s 994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding-up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted.

[74] A more recent case of *Bridgehouse (Bradford No 2) Ltd* referred to *Fulham* and allowed a stay in relation to relief under s 1028(3) of the Companies Act 2006, as said at p 9 of 18:

> 40 ... The fact, moreover, that the present dispute relates to whether relief should be given pursuant to a statute does not mean that it does not also 'aris[e] out of the provisions of' the Contract. Further, there is no question of the Contract 'mak[ing] it clear' that questions as to relief under section 1028(3) were intended to be excluded from the arbitrator's jurisdiction, which suggests that clause 19.1(a) should be presumed to apply in a accordance with the guidance given in the *Fiona Trust* case.

[75] Moving on to Singapore, we have *Tjong Very Sumito* wherein is stated at p 754:

> [45] ... The parties must be held to their original bargain in the absence of a compelling legal basis allowing one of them to unilaterally rewrite their agreement to arbitrate.
>
> The fact that by their arbitration clause the parties have made an agreement that their dispute should be resolved by a private tribunal is manifestly a very important consideration ...

[76] Next came *Larsen Oil* on the issue of claims involving an insolvent company being permitted to be resolved through the arbitral process where the Court of Appeal stated at p 423:

> [19] There are, all in all, strong reasons for supporting a generous approach towards the construction of the scope of arbitration clauses, given that such an approach has received widespread acceptance among the leading commercial jurisdictions, and is strongly supported by the academic community. Such an approach is also consistent with this court's philosophy of facilitating arbitration (see, for instance, the case of *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR 732; [2009] 4 SLR(R) 732 where we adopted a generous interpretation of the word 'dispute' in an arbitration clause). Accordingly, we agree that the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise.

[77] The above cases would show that stay can be allowed even in the face of statutory provisions conferring jurisdiction in courts. There is also the prevailing view that arbitration clauses should be generously construed and that parties must be held to their original bargain.

[78] Nevertheless, we find there are exceptions to the presumption of arbitrability, as was stated in *Larsen Oil* at p 431:

> [44] The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is a inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

[79] Ultimately it was felt that arbitration of claims would run contrary to the objectives of the insolvency regime as rights of third parties, ie, creditors, would be affected (para 45).

[80] *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other*

appeals [2015] SGCA 57 similarly stated at p 22 of 46:

> [84] In our judgment, a claim for relief under s 216 of the Companies Act stands on a different footing from the liquidation of an insolvent company or avoidance claims that arise upon insolvency because the former generally does not engage the public policy considerations involved in the latter two situations. There is certainly nothing in the text of s 216 to suggest an express or implied preclusion of arbitration. Nor does the legislative history and statutory purpose of the provision suggest that a dispute over minority oppression or unfair prejudice is of a nature which makes it contrary to public policy for dispute to be adjudicated by an arbitral tribunal.

[81] The exception to arbitrability would therefore be if interests of wider parties, such as creditors, are involved; where Parliament intended to exclude arbitration or an inherent conflict between arbitration and public policy considerations.

Exception to arbitrability vis a vis ss 106 and 107 of the CA 2016

[82] We have earlier found there can be an exception to arbitrability as outlined above and the applicable provision, if any, is s 4(2) of the AA 2005. The issue therefore is how would statutory provisions bring about such an exception. The submissions of the appellant are that only the courts can direct the registration of the shares in question.

[83] Sections 106 and 107 of the CA 2016 provide as follows:

> 106 Registration of transfer or refusal of registration
>
> (1) A company shall enter or cause to be entered the name of the transferee in the register of members as shareholder within thirty days from the receipt of the instrument of transfer under subsection 105(1) unless —
>
> (a) this Act or the constitution of the company expressly permits the directors to refuse or delay registration for the reasons stated;
>
> (b) the directors passed a resolution to refuse or delay the registration of the transfer within thirty days from the receipt of the instrument of transfer and the resolution sets out in full the reasons for refusing or delaying the registration; and
>
> (c) the notice of the resolution, and in the case of a public company including the reasons referred to in paragraph (b) is sent to the transferor and to the transferee within seven days of the resolution being passed.
>
> (2) Subject to the constitution, the directors may refuse or delay the registration of a transfer of shares under subsection (1) where the shareholder fails to pay the company an amount due in respect of those shares, whether by way of consideration for the issue of the shares or in respect of the sums payable by the shareholder in accordance with the constitution.

...

107 Order of Court for registration

(1) If a company refuses to register a transfer, the transferee or the transferor may apply to the Court for an order under this section.

(2) On an application under subsection (1), the Court may order the company to register the transfer, if the Court is satisfied that the application is well-founded.

[84] Section 106(1)(a) states that a company shall register transfer of shares unless the Act or the constitution expressly permits the directors to refuse or delay registration. Here, we have a situation where there are disputes between the shareholders concerning pre-emption provisions in the SHA and the constitution. We note *Ling Beng Hui & Ors v Ling Beng Sung* [1990] 2 MLJ 186 at p 189, that the memorandum and articles of association constitute a contract between the members inter se; the contract is deemed to contain covenants that each member will observe all the provisions; and every member has a personal right to have the terms observed.

[85] In the House of Lords decision of *Lyle and Scott Ltd v Scott's Trustees; Lyle & Scott Ltd v British Investment Trust Ltd* [1959] AC 763, it was said at p 775 that the shareholder had to adhere to the pre-emption clause as that was the bargain he made when he became a shareholder and he must abide by it.

[86] Further at p 779:

Another argument was that article 9 cannot be used as a compulsitor, that it is an avenue open to a shareholder who desires to sell his shares, but that he cannot be compelled to use it. That is true in a sense. No action can be taken against a shareholder who merely says that he wishes to sell or does something which shows that is his intention. But, when he goes further and does something which is a breach of his obligations under the article, the position appears to me to be quite different. Unless some action can then be taken to assert the other shareholders' rights under the article there is a wrong without a remedy.

[87] In the New Zealand High Court decision of *Rodgers v Advanced Creative Technologies Ltd* [2013] NZCCLR 17, it was said at pp 11 and 12 of 19:

A company in its constitution can restrict the transfer of its shares, for example, by imposing rights of pre-emption on existing shareholders. Further, restrictions can be placed on the transfer of shares in other circumstances. However, any restrictions on transfer must be in clear and unambiguous terms, and the Courts will construe such restrictions strictly.

[88] The cases above therefore, supports the proposition the appellant

cannot amount a challenge against arbitrability when the claim, dispute or controversy is indisputably connected to the pre-emption provisions contained in the articles of association read together with the SHA.

[89] Then comes s 107(2) of the CA 2016 which we find confers a discretion on the court whether or not to register the shares. This is evident from the words may' and 'well founded'. Such discretion can only be exercised after due enquiry into the reasons for the respondents' non-registration of the shares which necessarily has to lead to the pre-emption rights in the articles of association and SHA. The pre-emption rights are as in cl 9 SHA, and articles 37–52 of the articles of association.

[90] The language employed in the aforesaid statutory provisions do not expressly exclude arbitration and there has been no evidence put forth that it was the legislative intent to so exclude. There is no wider interests of third parties involved such as creditors as this only involve parties within SHA. We, therefore, find the statutory provisions as per ss 106 and 107 of the CA 2016 are not an exception to arbitrability.

[91] There can therefore, also be no issue of a statutory right being taken away by a private agreement to arbitrate or such statutory right rendering the matter incapable of arbitration.

Beneficial interest of the appellant and respondents being duty bound to effect the registration

[92] The appellant relied on *Chan Yock Cher* that as he had beneficial interest the shares must therefore be registered in his name. It was stated at p 548:

> ... the law on this issue is well settled that the beneficial interest passes to the purchase of shares upon his full payment and execution of the transfer documents, notwithstanding that the provisions of the articles of association restricting transfer of shares have not been complied with. Those restrictions do not affect and have no application or bearing on the passing of beneficial interest and apply only to restrict the registration of legal interest.

[93] The court had also noted in p 545:

> From the reading of s 6A(6) it becomes obvious to us that it gives statutory recognition to beneficial interest in shares without the legal (or registrable) interest ...

[94] It was then submitted that pursuant to ss 164 and 165 of the Contracts Act 1950, the respondents are duty bound to carry out the instructions of their principals to effect such registration.

[95] We find the passage in *Chan Yock Cher* above does support the proposition that beneficial interest passes to the purchaser of shares upon payment and execution of transfer documents. It further states this is despite provisions of the articles of association restricting transfer of shares having not been complied with. We emphasise, however, the restrictions on transfer of shares not being complied with do not affect the passing of beneficial interest, but it applies only to restrict the registration of legal interest. There can therefore, still be a restriction on registration of legal interest which is what the appellant is seeking.

[96] This is made clear by the discussion of the Federal Court in pp 546 and 547. Reference was made to *Palmers Company Law* (24th Ed) at p 613 that a 'transfer is incomplete until registered. Pending registration, the transferee has only an equitable right to the shares transferred to him. He does not become the legal owner until his name is entered on the register in respect of these shares'.

[97] The Federal Court at p 546 referred to an Australian case:

> In *Re Fernlake Pty Ltd* (1994) 12 ACLC 453, it was held by the Supreme Court of Queensland that where the transferor (vendor) and transferee (purchaser) entered into a contract for the sale of shares but the share transfer is not registered by the company for any non-compliance or breach of articles of association the company need only recognise legal interest in the sale shares and is not affected by notice of any trusts. The effect of this is that the company recognises the transferor as holder of the shares until his name is removed from the register and replaced by the name of the transferee.

[98] In *Re Fernlake* too, at p 602 it was stated:

> ... It is one thing to say that as between the vendor and purchaser the mutual rights and obligations which they have created by their agreement affect the manner in which each are to act in respect of the subject property. It is quite another matter to suggest that those bilateral rights and obligations can somehow affect the company, even though a party to the original agreement to sell shares. It was not submitted that the company was bound by the trust which arose out of the sale agreement, and in the absence of such an assertion I fail to see why the company should be required to consider the interests of the respondent. This accords with the limited nature of the company's participation in the sale agreement.

[99] Although the appellant does have beneficial interest, *Chan Yock Cher* recognises there can still be a restriction on the registration of legal interest. The respondents are not bound to recognise such beneficial interest given the dispute which has arisen on the pre-emption of SHA. This is provided in article 8 of the articles of association as follows:

> Except as required by law, these Articles and the Shareholders' Agreement, no

person shall be recognised by the Company as holding any share upon any trust and the Company shall not be bound by or recognise any interest in any share except an absolute right to the entirely thereof in the holder. Whether applicable and provided by law, the Company is empowered to require any member transferee prior to registration of transfer, to furnish the nature of his shareholding and may also require a trustee or nominee to provide such particulars to enable the Company to identify the beneficial owners and the nature of their interest.

[100] Hence, whether the appellant is entitled to have the shares registered in his name and whether the respondents are bound to do so remains in dispute.

[101] Under the circumstances, the issue of the respondents being duty bound as agents to register the shares as per ss 164 and 165 of the Contracts Act 1950, does not arise.

That Tindak Murni is not applicable

[102] The appellant had also submitted that *Tindak Murni* does not apply as *Chan Yock Cher* takes precedence; *Tindak Murni* is to be distinguished on the facts; the arbitration clause in *Tindak Murni* involves a construction contract between employer and contractor and such arbitration clause did not contain a requirement for parties to resolve their disputes amicably prior to initiating arbitration.

[103] We believe we have sufficiently addressed this in our reasons as to why a stay has to be granted and the penultimate paragraphs above relating to *Chan Yock Cher*. The ratio of *Tindak Murni* and for that matter *Press Metal Sarawak*, is that s 10(1) of the AA 2005 makes it mandatory for a court to grant a stay where there is a valid arbitration agreement, the arbitration agreement is not null and void, inapplicable, inoperative or incapable of being performed and no steps in the proceedings have been taken. The arbitration agreement here is cl 16, which requires a dispute to be referred to arbitration. We find there is indeed a dispute for which we need not delve into the merits. We appreciate there will be differences in each case, which however does not detract from the legal principles established on a stay.

CONCLUSION

[104] For the reasons given above, we dismissed both appeals and ordered costs of RM8,000 on each appeal to the first respondent, subject to allocatur.

Appeals dismissed.

Reported by Ahmad Ismail Illman Mohd Razali